

NEW JERSEY REGISTER
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VOLUME 40, ISSUE 20

ISSUE DATE: OCTOBER 20, 2008

RULE ADOPTIONS

**COMMUNITY AFFAIRS
NEW JERSEY COUNCIL ON AFFORDABLE HOUSING**

40 N.J.R. 5962(a)

Adopted Amendments: N.J.A.C. 5:96-8.5, 15.2 and 16.2

Adopted New Rule: N.J.A.C. 5:96-16.3

Procedural Rules of the New Jersey Council on Affordable Housing for the Period Beginning on June 2, 2008

Revision of Housing Element and Fair Share Plan as a Result of Mediation; Waiver Requirements; Municipalities that Petitioned for But Did Not Receive Third Round Substantive Certification; Municipalities that Received Third Round Substantive Certification On or Before January 25, 2007 Which Is Still Valid

Proposed: June 16, 2008 at 40 N.J.R. 3373(a).

Adopted: September 22, 2008 by the New Jersey Council on Affordable Housing, Lucy Vandenberg, Executive Director.

Filed: September 23, 2008 as R.2008 d.314, **without change**.

Authority: N.J.S.A. 52:27D-301 et seq.

Effective Date: October 20, 2008.

Expiration Date: June 2, 2013.

Summary of Public Comments and Agency Responses:

The Council received 24 sets of written comments and public statements from the following individuals or organizations:

1. Bayer, Andrew, on behalf of Hillsborough Township, NJ
2. Bayer, Andrew, on behalf of the Borough of Tinton Falls, NJ

3. Brook, Richard A., Florence Township, NJ
4. Cranbury Township Committee, Cranbury, NJ
5. Dougherty, Linda, Edgewater Park Township, NJ
6. Dressel, William, NJ League of Municipalities, Trenton, NJ
7. Frankford Township Committee, Frankford, NJ
8. Goldschlag, Bonnie, Monmouth County Planning Board, NJ
9. Healey, Mark A., Township of Franklin, Somerset County, NJ
10. Holtaway, Robert F., Mayor, Bedminster Township, NJ
11. Kantowitz, Jeffrey, Goldberg, Mufson & Spar, West Orange, NJ
12. Lohr, Janice, Delanco Township, NJ
13. Norman, Christopher, Township of Mount Laurel, NJ
14. Readington Township Committee, Readington, NJ
15. Ritter, John, Cranbury Township, NJ
16. Russo, John F., Russo and Cassidy, LLC, Toms River, NJ
17. Secaucus Affordable Housing Board, Secaucus, NJ
18. Surenian, Jeffrey R., Jeffrey R. Surenian and Associates, Brielle, NJ
19. Thoms, John A., Mayor, Borough of New Providence, NJ
20. Van Den Kooy, Peter, on behalf of Oldmans Township, NJ
21. Voyce, William, Mayor, Township of Tewksbury, Califon, NJ
22. Walsh, Kevin, Fair Share Housing Center, Cherry Hill, NJ
23. Watkins, Matthew, South Brunswick Township, NJ
24. West Windsor Township, NJ

N.J.A.C. 5:96 General

COMMENT: There are still pending amendments to the third round rules which were not affected by the recent adoption of A500. The Council on Affordable Housing (COAH) is taking public comments on these amendments until August 15, 2008. Although the amendments may not become effective until October of this year, if approved, municipalities would be required to apply the proposed amendments as part of their housing plan which must be submitted to COAH by December 31, 2008.

RESPONSE: The Council believes that extending the deadline beyond December 31 will only serve to delay the process and inhibit the production of affordable housing. On March 25, 2008, the Council passed a resolution granting

municipalities with pending petitions a waiver from N.J.A.C. 5:97-6.2(c) for municipalities with COAH approved development fees and an established housing trust fund account to allow the expenditure of housing trust funds prior to the grant of certification and/or approval of a spending plan, on the cost of developing a revised Housing Element and Fair Share Plan in accordance with the Council's proposed third round rules. COAH also facilitated 10 seminars to provide guidance on the revised rules and P.L. 2008, c. 46 to assist municipalities in developing revised housing elements and fair share plans to be submitted in a petition on or by December 31, 2008. In addition, the commenter should note that the adopted June 2, 2008 procedural rules include three municipal petition deadlines: September 30, November 15, and December 31, 2008. On June 6, 2008, the Council passed a resolution granting a waiver to municipalities that were required to petition on September 30 or November 15 from N.J.A.C. 5:96-16.2(a)1 and 2 requiring the municipalities to re-petition with an amended third round housing element and fair share plan on or before December 31, 2008 if they wish to remain under the Council's jurisdiction.

N.J.A.C. 5:96-8.5(d)

COMMENT: If COAH is going to extinguish the right of a municipality to determine its own destiny through a procedural regulation, COAH will simultaneously extinguish the incentive for municipalities to subject themselves to an administrative process that fails to offer adequate protections against the often outrageous demands of developers. If COAH is going to suggest that a builder's remedy may be appropriate before such time as its staff and the municipality have had a chance to work together, COAH needs to make clear in the future as it has in the past that it will only require "site specific relief" in the rarest of circumstances and that it will respect the municipality's choices as to how to comply. Furthermore, COAH should include a provision allowing the municipality to immediately contest such a determination with a full factual hearing to determine whether such extraordinary relief is indeed warranted. The Legislature enacted the Fair Housing Act (FHA) to create an alternative to the builder's remedy. COAH should therefore allow a builder's remedy as a last resort as it did in *Motzenbecker vs Bernardsville*--not at the outset in conjunction with a pre-mediation report.

RESPONSE: The commenter should note this provision only applies after the municipality has already submitted two petitions prior to certification and if a third petition is required to make the plan whole. The commenter should further note that the Council will make its decision on a case-by-case basis based on the facts presented as to whether or not the objector's site should be included in a municipal plan to address a shortfall.

COMMENT: After decades of experience, COAH knows full well that municipalities rarely submit perfect plans at the outset. COAH's insistence (a) that municipalities submit plans before COAH has finalized its regulations and (b) that municipalities submit all their plans prior to December 31, 2008 will undoubtedly affect the quality of those submissions. COAH knows full well this is true. Instead of threatening municipalities with what is tantamount to builder's remedy at the pre-mediation stage, COAH should encourage municipalities to bring themselves within the COAH process and to work with municipalities to help them perfect their plans under the protections of that process. To threaten municipalities with a builder's remedy at the pre-mediation stage creates great disincentives for municipalities to accept COAH's invitation to achieve constitutional compliance under the shelter of its process.

RESPONSE: The commenter should note this provision only applies after the municipality has already submitted two petitions prior to certification and if a third petition is required to make the plan whole. The commenter should further note that the Council will make its decision on a case-by-case basis based on the facts presented as to whether or not the objector's site should be included in a municipal plan to address a shortfall.

COMMENT: This rule includes a provision where COAH can order a municipality to amend its Housing Element and Fair Share Plan to include an objector's site and address any shortfall noted in the pre-mediation report if the objector's site is suitable. This provision, in essence, authorizes a builder's remedy on the basis of the following: "The Council will take into consideration the length of time the municipality has been under the Council's jurisdiction and whether or not the municipality was previously granted substantive certification." By this language, COAH suggests that the municipality is responsible for its failure to expeditiously process a municipality's petition. It is not. It is

profoundly unfair for COAH to suggest that it will expose any municipality to what is tantamount to a builder's remedy because it has been within COAH's jurisdiction for a long time. If a municipality abuses the process, an interested party can move or COAH itself can move to take what COAH itself has recognized is a dramatic step - accelerated denial of the petition for substantive certification. However, for COAH to draw a negative inference from "the length of time the municipality has been under the Council's jurisdiction" is entirely inappropriate.

RESPONSE: The commenter should note this provision only applies after the municipality has already submitted two petitions prior to certification and if a third petition is required to make the plan whole. The commenter should further note that the Council will make its decision on a case-by-case basis based on the facts presented as to whether or not the objector's site should be included in a municipal plan to address a shortfall.

COMMENT: The rule should be amended to provide that the Council shall (not "may") include the objector's site. Otherwise, there is diminished incentive for developer/objector's to participate and for towns to comply. Also, the considerations of the Council should include not only those listed, but more broad considerations such as the town's track record in actually producing affordable housing by way of actual units, and the steps and circumstances taken by the town during the past decade. Only considering the length of time under COAH jurisdiction and previous certifications, without looking at what actually happened is too limiting.

RESPONSE: The commenter should note this provision only applies after the municipality has already submitted two petitions prior to certification and if a third petition is required to make the plan whole. The commenter should further note that the Council will make its decision on a case-by-case basis based on the facts presented as to [page=5964] whether or not the objector's site should be included in a municipal plan to address a shortfall.

N.J.A.C. 5:96-11.8

COMMENT: COAH must revise the regulations to state explicitly that the regulations must not be interpreted as requiring municipalities to expend their own monies for affordable housing in contravention of the Fair Housing Act and of Article VIII, Section II, Paragraph 5 of the New Jersey Constitution, which prohibits unfunded mandates, and should provide an absolute assurance to municipalities that it will not require them to make such an expenditure of funds. It should also modify the remedy section, N.J.A.C. 5:96-11.8, to bar the imposition of requirements necessitating the expenditure of municipal funds.

RESPONSE: This comment is outside the scope of this rule proposal.

N.J.A.C. 5:96-15

COMMENT: In applying the standard of "unnecessary" financial, environmental or other hardship for a waiver, COAH's standard should be unnecessary in order to fully provide a realistic opportunity for affordable housing. COAH's primary responsibility is to ensure provision of a realistic opportunity. If that can be done more cheaply or in a more environmentally friendly way, that is positive, but if COAH grants waivers at the expense of fully providing a realistic opportunity it does so in violation of its statutory and constitutional mandate.

RESPONSE: The commenter should note that this provision remains unchanged from the rules that became effective on June 2, 2008 and is therefore outside the scope of this rule proposal.

N.J.A.C. 5:96-15.2

COMMENT: The commenter seeks clarification as to whether these factors are disjunctive or conjunctive. For towns, the rule should be conjunctive. They should have to meet all of the criteria. Otherwise, COAH's rules will be easily flouted. Also, COAH should include language stating that specific facts and findings are necessary to support each criterion and the waiver altogether. The elimination of staggered deadlines is problematic. As experience taught,

COAH was overwhelmed last time in December 2005 and there is every reason to think the same circumstances will occur. Consequently, the deadlines for review will be unduly extended, even way beyond a month or two, despite the latest set of procedural time tables. Other than extending all of the subsequent deadlines, which is unwise, against the public interest, and counterproductive, how can COAH expect to meet its deadlines for review, issuance of premediation reports, mediation, etc. unless it is prepared to dismiss towns that fail to submit initially sufficiently detailed plans for review. If not, then the process of delay will repeat itself.

RESPONSE: The commenter should note that N.J.A.C. 5:96-15.2(a)1 is disjunctive from N.J.A.C. 5:96-15.2(a)2 through 4 which are conjunctive for anyone seeking a waiver. In addition, the rule is similar to the rule previously codified at N.J.A.C. 5:93-15.1. Also, prior to scheduling a waiver for Council action, all waiver requests are circulated to the municipal service list for comments from interested parties.

N.J.A.C. 5:96-16.2

COMMENT: The unrealistic December 31, 2008 time frame for completion of housing elements by New Jersey municipalities will encourage ad hoc solutions that are "anti-planning." Specifically, the comments being submitted on these proposed, but not yet adopted, rules will form the basis for the housing element that is due to COAH in about four months.

RESPONSE: The Council believes that extending the deadline beyond December 31 will only serve to delay the process and inhibit the production of affordable housing. On March 25, 2008, the Council passed a resolution granting municipalities with pending petitions a waiver from N.J.A.C. 5:97-6.2(c) for municipalities with COAH approved development fees and an established housing trust fund account to allow the expenditure of housing trust funds prior to the grant of certification and/or approval of a spending plan, on the cost of developing a revised Housing Element and Fair Share Plan in accordance with the Council's proposed third round rules. COAH also facilitated 10 seminars to provide guidance on the revised rules and P.L. 2008, c. 46 to assist municipalities in developing revised housing elements and fair share plans to be submitted in a petition on or by December 31, 2008. In addition, the commenter should note that the adopted June 2, 2008 procedural rules include three municipal petition deadlines: September 30, November 15, and December 31, 2008. On June 6, 2008, the Council passed a resolution granting a waiver to municipalities that were required to petition on September 30 or November 15 from N.J.A.C. 5:96-16.2(a)1 and 2 requiring the municipalities to re-petition with an amended third round housing element and fair share plan on or before December 31, 2008 if they wish to remain under the Council's jurisdiction.

COMMENT: COAH should extend the deadline beyond December 31, 2008 for municipalities to re-petition for third round substantive certification with an amended plan. COAH is requiring municipalities to prepare their amended affordable housing plans in accordance with rule revisions that will not be adopted until September or October 2008. Furthermore, COAH will be required to revise its regulations to implement the provisions of the recently enacted "Roberts' Bill," P.L. 2008, c. 46. These regulations will not be effective until after December 31, 2008. Finally, as announced by Assembly Speaker Roberts, the legislature will be considering further changes to the Roberts' Bill this fall, which could lead to further regulatory revisions. To require municipalities to expend further time and money to prepare amended plans pursuant to rules that are in a state of flux places an unnecessary and undue burden on the taxpayers.

RESPONSE: The Council believes that extending the deadline beyond December 31 will only serve to delay the process and inhibit the production of affordable housing. On March 25, 2008, the Council passed a resolution granting municipalities with pending petitions a waiver from N.J.A.C. 5:97-6.2(c) for municipalities with COAH approved development fees and an established housing trust fund account to allow the expenditure of housing trust funds prior to the grant of certification and/or approval of a spending plan, on the cost of developing a revised Housing Element and Fair Share Plan in accordance with the Council's proposed third round rules. COAH also facilitated 10 seminars to provide guidance on the revised rules and P.L. 2008, c. 46 to assist municipalities in developing revised housing elements and fair share plans to be submitted in a petition on or by December 31, 2008. In addition, the commenter

should note that the adopted June 2, 2008 procedural rules include three municipal petition deadlines: September 30, November 15, and December 31, 2008. On June 6, 2008, the Council passed a resolution granting a waiver to municipalities that were required to petition on September 30 or November 15 from N.J.A.C. 5:96-16.2(a)1 and 2 requiring the municipalities to re-petition with an amended third round housing element and fair share plan on or before December 31, 2008 if they wish to remain under the Council's jurisdiction.

N.J.A.C. 5:96-16.2(a)

COMMENT: Tinton Falls is a municipality which has produced a significant amount of affordable housing and has remained in compliance with its affordable housing obligation since COAH's inception. After COAH adopted its original third round rules in 2004, Tinton Falls expended significant public monies in developing a third round plan in conformance with those regulations. Through no fault of the Borough, the Court set aside those regulations. Now, the Borough is confronted with having to develop a new third round plan with regulations which were just adopted in June 2008 with amendments which will be adopted in September 2008. This provides the Borough with only a few months to develop a new plan. More importantly, there are 20 lawsuits filed challenging these regulations. If the regulations are set aside again, the Borough will have expended additional municipal resources to prepare a new plan, which may have to be revised again under new regulations. This is simply unfair to Tinton Falls and all municipalities.

RESPONSE: The council believes that extending the deadline beyond December 31 will only serve to delay the process and inhibit the production of affordable housing. On March 25, 2008, the Council passed a resolution granting municipalities with pending petitions a waiver from N.J.A.C. 5:97-6.2(c) for municipalities with COAH approved development fees and an established housing trust fund account to allow the expenditure of housing trust funds prior to the grant of certification and/or approval of a spending plan, on the cost of developing a revised Housing Element and Fair Share Plan in accordance with the Council's [page=5965] proposed third round rules. COAH also facilitated 10 seminars to provide guidance on the revised rules and P.L. 2008, c. 46 to assist municipalities in developing revised housing elements and fair share plans to be submitted in a petition on or by December 31, 2008.

N.J.A.C. 5:96-16.3

COMMENT: Given the disparity between the old rules and the new rules in their length, what will towns that received certification before January 25, 2007 have to do in 2015 to receive certification for the remainder of the third round? Towns should have to show how their full third round obligation, as projected under the new numbers, will be met by 2018, and should be clearly told that this is the case now so that they can plan appropriately.

RESPONSE: The commenter should note that the rules allow a municipality that received certification before January 25, 2007 the option to amend its plan and petition with a revised Housing Element and Fair Share Plan that complies with N.J.A.C. 5:96 and 5:97. The commenter should also note that the three municipalities falling in this category will be required to petition to address the remaining affordable housing obligation pursuant to N.J.A.C. 5:97 prior to the expiration of the previously granted substantive certification, in order to remain under COAH's jurisdiction.

N.J.A.C. 5:96-17.4 and 18.3

COMMENT: These rules set forth the educational requirements for municipal housing liaisons and administrative agents. However, the six-month, or December 2, 2008, deadline for completion of the education program is unrealistic, especially given the uncertainty of the COAH regulations.

RESPONSE: The comment is outside the scope of this rule proposal.

N.J.A.C. 5:96-18.1

COMMENT: The creation of Regional Contribution Agreement (RCA) Administrators is overly burdensome,

especially when coupled with the fact that municipal housing liaisons and administrative agents are already in place pursuant to COAH Regulations, and RCAs are likely to be eliminated.

RESPONSE: The comment is outside the scope of this rule proposal.

Federal Standards Statement

No Federal standards analysis is required because these amendments and new rule are not being adopted in order to implement, comply with, or participate in any program established under Federal law or under a State law that incorporates or refers to Federal law, standards, or requirements.

Full text of the adoption follows:

5:96-8.5 Revision of Housing Element and Fair Share Plan as a result of mediation

(a)-(c) (No change.)

(d) If the mediation proceedings fail to progress or mediation cannot resolve a dispute and the municipality's Fair Share Plan does not create a realistic opportunity pursuant to N.J.A.C. 5:97 and the objector's site is in conformance with N.J.A.C. 5:97-3.13, the Council may either: direct the municipality to amend its Housing Element and Fair Share Plan to include the objector's site to address any shortfall noted in the premediation report provided or deny substantive certification pursuant to N.J.A.C. 5:96-12.2. The Council will take into consideration the length of time the municipality has been under the Council's jurisdiction and whether or not the municipality was previously granted substantive certification.

(e) (No change.)

5:96-15.2 Waiver requirements

(a) The Council may grant waivers from specific provisions of its rules if the person demonstrates that the strict application of the rule would create an unnecessary financial, environmental or other hardship; or

Recodify existing 2.-4. as 1.-3. (No change in text.)

5:96-16.2 Municipalities that petitioned for but did not receive third round substantive certification

(a) To remain under the jurisdiction of the Council, a municipality that petitioned for but did not receive third round substantive certification shall re-petition with an amended third round Housing Element and Fair Share Plan on or before noon December 31, 2008.

5:96-16.3 Municipalities that received third round substantive certification on or before January 25, 2007 which is still valid

(a) All municipalities that received third round substantive certification on or before January 25, 2007 may petition to address the revised third round obligation in accordance with N.J.A.C. 5:96 and 5:97.

(b) All municipalities that received third round substantive certification on or before January 25, 2007 and choose not to do (a) above shall be subject to N.J.A.C. 5:94 and 5:95, for the period of substantive certification, not extending beyond 2015.